No. 15,740

IN THE

United States Court of Appeals

For the Ninth Circuit

JACQUES ARTHUR GUBBELS,
Appellant,

vs.

ALBERT DEL GUERCIO, as District Director, Immigration and Naturalization Service, Los Angeles, California,
Appellee.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

This appeal is from a judgment (T. 17-21) of the United States District Court for the Southern District of California, Central Division, in an action for judicial review of an order of deportation. The action was brought pursuant to 28 U.S.C. 2201 and 5 U.S.C. 1009 (T. 3), and jurisdiction of the court below is predicated upon those sections and upon 8 U.S.C. 1329. Jurisdiction to review the judgment of the court below is conferred upon this Court by 28 U.S.C. 1291.

STATEMENT OF THE CASE.

The facts are not in dispute. Appellant is twenty-two years old, a native of Belgium and a citizen of the Netherlands. He arrived in the United States with his parents[1] on February 3, 1948, when he was twelve years of age, and was admitted for permanent residence. At the age of seventeen he enlisted in the United States Army. On September 13, 1954, while serving in Germany, he pleaded guilty before a court-martial to charges of violating Articles 121 and 122 of the Uniform Code of Military Justice (50 U.S.C., former Sections 715, 716), i.e., that he stole a pistol which was the property of the United States and that he stole an automobile, both being of the value of more than $50.00. The violations occurred in Germany on March 16, 1954 and on August 2, 1954, respectively. Appellant was then nineteen years of age. The court-martial ordered that he be confined at hard labor for five years and that he be dishonorably discharged. He was released from said confinement on parole on September 29, 1956.

Appellant's deportation has been ordered under the Immigration and Nationality Act of 1952 on the ground that he is one who "after entry was convicted of two crimes involving moral turpitude" (8 U.S.C. 1251(a)(4)).

The District Court has upheld the validity of the deportation order, and its opinion (T. 12-17) is reported at 152 F.S. 277.

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[1]The parents have since become naturalized citizens.

The questions involved in this appeal are:

1. Does the judgment of the court-martial bring appellant within the purview of the deportation statute (8 U.S.C.A. 1251(a)(4), supra)?

2. Has appellant been convicted of two crimes involving moral turpitude within the meaning of that subsection?

SPECIFICATION OF ERRORS.

The errors relied upon by appellant are:

1. That the District Court erred in holding that the judgment of the court-martial constitutes conviction of crimes within the meaning of 8 U.S.C. 1251(a)(4);

2. That the District Court erred in holding that appellant has been convicted of two crimes involving moral turpitude within the meaning of that subsection.

ARGUMENT.

I.

THE JUDGMENT OF A COURT-MARTIAL DOES NOT CONSTITUTE CONVICTION OF CRIME WITHIN THE MEANING OF THE DEPORTATION STATUTE (8 U.S.C. 1251(a)(4)).

The question whether the deportation provisions relative to persons convicted of crimes involving moral turpitude are applicable to judgments of a military tribunal has not heretofore been judicially

decided in any reported case. The question was mentioned in passing but was left undecided in *U. S. ex rel. Parenti v. Martineau,* 50 F.2d 902.

The administrative holdings on this question over the years have not been consistent. For a number of years the executive department held that judgments in court-martial proceedings did not constitute convictions of crime within the meaning of the deportation statute. Subsequently, the Board of Immigration Appeals adopted the contrary view. Before summarizing these conflicting administrative opinions, we refer briefly to certain basic considerations.

First, the deportation statute itself (8 U.S.C. 1251); the pertinent provisions of the statute are as follows:

> "Sec. 241. *Deportable aliens—General classes*
>
> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;
>
> * * * * * * *
>
> (b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes *shall not apply* * * *

(2) *if the court sentencing such alien* for such crime *shall make,* at the time of first imposing judgment or passing sentence, *or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.*" (Italics added.)

Secondly, the Supreme Court has held that the rule of construction to be applied in determining the effect of these deportation provisions is "that which is required by the narrowest of several possible meanings of the words used" (*Fong Haw Tan v. Phelan,* 333 U.S. 6, 68 S.Ct. 374, 92 L.Ed. 433). In that case the Supreme Court was considering the corresponding provision of the prior deportation statute (8 U.S.C. 155) which required deportation of aliens "sentenced more than once" to imprisonment for a year or more because of conviction in this country of crimes involving moral turpitude. The provision involved in the case at bar is derived from that same clause but makes deportation depend upon convictions alone rather than upon the length of sentences imposed. The language of the Supreme Court is most significant:

"We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. *Delgadillo v. Carmichael,* 332 U.S. 388, 68

> S.Ct. 10. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that *which is required by the narrowest of several possible meanings of the words used.*" (Italics added.)

There are basic reasons why Section 1251(a)(4), supra, should not be construed as embracing military offenders within its operation on the basis of judgments of a court-martial. In the first place, the specific exception in subsection (b) that the deportation provision *shall not apply* if "the court" at the time of judgment or "within thirty days thereafter" makes a recommendation that the alien not be deported cannot have reference to courts-martial which, as we shall show, are not courts but agencies of the executive department of the Government, which are created as a mere incident to the military function to provide a summary means of maintaining military discipline and control, which are called into existence for a specific purpose to perform a particular duty, and which are dissolved when that purpose has been accomplished. Subsection (b), supra, plainly contemplates judicial proceedings in which the parties, after judgment, may, by formal representations to the court, invoke the court's statutory authority with regard to making recommendation that the convicted person be not deported. This is an authority frequently exercised by the courts (e.g. *Ex parte Robles-*

Rubio, 119 F.S. 610), and certainly courts are especially fitted to make such a determination upon consideration of the alien's entire background, whereas, such a determination is wholly inapposite to military tribunals by their very nature, purpose and function.

As subdivision (b) of the section is a specific excepting clause to the operation of subsection (a)(4), it must be read in conjunction with that subsection, and as a part thereof. Certainly it would strain the bounds of reason and logic to say that Congress, in speaking of a court making a recommendation at the time of judgment or within thirty days thereafter, upon notice to the Immigration and Naturalization Service and the prosecution authorities, with opportunity for them to be heard in the matter, had in contemplation such matters as proceedings before military tribunals convened (frequently in foreign lands) to consider infractions on the part of a member of the armed forces. It is this consideration which led to the administrative view originally that the similar provisions of the prior deportation act did not apply to judgments of military tribunals.

The earliest published administrative decision on this point is

Matter of P—, Vol. I, Admin. Dec. under Immigration and Nationality Laws, page 3.

That case involved conviction by court-martial in a foreign army of stealing money from a fellow soldier. Deportation had been sought under that portion of the former deportation statute (8 U.S.C. 155) which required deportation of any alien "who was convicted,

or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude." With regard to the charge of *conviction,* the Board of Immigration Appeals said:

> "In the consideration of this case on April 18, 1940, on the basis of an opinion of the Solicitor of Labor (55871/359), which had been adopted by the Immigration and Naturalization Service, it was concluded that the respondent was not subject to deportation because he had been convicted of a crime for the reason that a conviction by a court-martial was not considered a 'conviction' under the immigration laws."

The Board concluded, however, that although the alien was not deportable as one who had been *"convicted,"* he was within the other portion of the clause there involved relative to one who *admitted* the commission of theft prior to entry. Subsequently, the Attorney General *reversed* the Board's decision and cancelled the deportation proceedings entirely, stating that: "It is an admission that respondent took the money, but the record is bare of evidence indicating that he took it with a criminal intent, or that respondent's conduct in the army would have constituted a civil crime under Italian law" (Id. page 39).

The effect of the decision of the Attorney General in that case, therefore, was to accept the view that conviction by a court-martial did not bring the alien within the terms of the deportation statute, and further to hold that he could not be deported as one who *admitted* the commission of a crime.

Some two years after the decision in the case just cited, the Board of Immigration Appeals decided another case involving conviction by court-martial of theft in Canada (*Matter of W—,* Vol. I, Admin. Dec. under Immigration and Nationality Laws, page 485), without mentioning the decision of the Attorney General nor its own decision in *Matter of P—,* supra. The Board did, however, mention the opinion handed down by the Solicitor of Labor on December 14, 1934, which held that court-martial convictions were not within the purview of the deportation statute. In that regard the Board said:

> "He asserted that the provisions of section 19 excepting from the consequences of a conviction an alien who had been pardoned or an alien as to whom the court or judge recommended against deportation could not be reconciled with the notion that the judgments of military tribunals were within the purview of the section; and finally, that in view of the principle that a penal statute should be strictly construed, the soundest construction of the statute should omit from its operation determinations of guilt not made under the criminal law administered by the civil authorities. Although it may be conceded, as the Solicitor maintains, that the issue is not free from difficulty, we think that consideration of the nature of court-martial proceedings leads to the conclusion that a conviction by a court-martial should be accorded the same dignity and effect as a conviction by an ordinary civil court."

We would point out that here the Board went off on a tangent. The question is not one of collateral attack

upon proceedings of a court-martial. The question is simply and solely whether the *deportation statute* in its reference to convictions and to courts is to be interpreted as comprehending within its scope the proceedings of a military tribunal, and in considering and determining that question, all the language of the deportation statute must be considered, and must be given the interpretation "which is required by the narrowest of several possible meanings of the words used" (*Fong Haw Tan v. Phelan,* supra).

Does the language of the deportation statute above quoted in "the narrowest of several possible meanings of the words used" permit of the interpretation that proceedings of military tribunals were in contemplation? We think not.

> "While courts-martial may and do discharge judicial functions and are therefore in a certain sense courts, they are not a part of the judiciary department of the Government; and are more properly classed as an executive agency belonging to the executive branch of the Government." (18 *Ruling Case Law,* 1061.)
>
> "A court martial is a military or naval tribunal which has jurisdiction of offenses against the law of the service, military or naval, in which the offender is engaged. Courts-martial, while resembling the civil courts in some respects, are yet entirely distinct in their nature from the civil tribunals; the power vested in the military courts is not a part of the judicial power of the United States within the meaning of the Constitution, and such courts are not included in the judicial department of the government." (Vol. 6, *Corpus Juris Secundum,* 440.)

In this connection, the language of the Supreme Court of the United States in the recent case of

U. S. ex rel. Toth v. Quarles, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8.

is particularly enlightening. In that case the court pointed out that court-martial jurisdiction "sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order." The Supreme Court also said:

> "We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property."
>
> * * * * * * *
>
> "Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function * * *. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in Federal courts."

Of course within their own sphere, proceedings of courts-martial are as unassailable as judgments of courts, but they are not "courts" as that term is used

in its usual sense, they are not part of the judicial department of the Government, and are "more properly classed as an executive agency belonging to the executive branch of the Government" (18 *Ruling Case Law,* 1061, supra). They are special agencies brought into being to meet the exigencies of the problem of military discipline; jurisdiction of a court-martial is limited and special, it being called into existence for a temporary and special purpose and to perform a special duty, and when the object of its creation has been accomplished, it ceases to exist (*United States v. McDonald,* 265 F. 754, 760, Appeal Dismissed, 256 U.S. 705, 41 S.Ct. 535, 65 L.Ed. 1180).

Moreover, the nature of courts-martial is not such as to enable them to make the judicial determination referred to in subsection (b) of the statute, whereby a defendant, at the time of, or after, judgment, is relieved from liability to deportation upon recommendation of the trial court made in the manner and within the time prescribed in the statute. To bring courts-martial within the scope of the statute, it would be necessary both to stretch words and to disregard substance.

To construe the judgments of courts-martial to be within the purview of Section 1251(a)(4) and 1251 (b), supra, would give rise to many incongruities. In the first place, the end result would be that aliens in the military service of the United States would be in a far worse position so far as the deportation provisions are concerned than would be the alien civilian. Certainly an alien soldier serving the United States on foreign soil who may be charged before a court-

martial, as was appellant here, would as a practical matter be deprived of the possible relief from deportation which is prescribed by subdivision (b) of the section, supra, since the military tribunal obviously would not and could not remain in being to consider representations of the immigration authorities in the United States as to whether or not a recommendation should be made that the soldier should not be deported. Being called into being to consider specified charges involving a person within the military jurisdiction, the function of the tribunal ceases when it has made its findings and pronounced its judgment. Unlike a court, it is not a body having continuous existence enabling it to consider and act upon supplemental proceedings of the character contemplated by Section 1251(b), supra.

Secondly, a minor alien serving in the United States armed forces and tried for an offense or infraction by a court-martial would be at a further disadvantage in comparison with the alien civilian accused in the civil courts of the same sort of transgression. For example, had appellant here been tried on the same charges in the State of California, which was the place of his residence at the time of his enlistment in the United States Army, the court might have suspended proceedings and certified the matter to the juvenile court, as permitted with respect to minors between the ages of eighteen and twenty-one (California Welfare and Institutions Code, Section 833.5), and if the juvenile court did not find that the minor was an unfit person to be treated as a juvenile, then all proceedings in the matter "shall not constitute

criminal proceedings of any nature against such minor person" (Section 833.5, supra), and of course would consequently not furnish any basis for deportation. This is another cogent reason why court-martial proceedings should not be regarded as within the purview of the deportation statute, in the absence of express words showing that proceedings of such tribunals were meant to be included.

Again, under military law certain conduct might be regarded as a crime which in civilian life would amount to no more than a civil tort. This particular matter will be discussed in greater detail in the succeeding subdivision of this brief.

To apply the deportation statute to military offenders would bring about a number of other incongruities and anomalies. It was consistently held by the administrative authorities that under the previous deportation statute (8 U.S.C. 155, supra), an alien who was convicted of crimes involving moral turpitude while serving in the United States armed forces *in foreign territory* was not subject to deportation because that statute covered only conviction "in this country." It was therefore concluded that prior to the enactment of the present statute (8 U.S.C. 1251, supra), convictions of United States army personnel by court-martial in Germany did not render the individual deportable.

Matter of J—, Vol. III, Admin. Dec. under Immigration and Nationality Laws, 536;

Matter of P—, Vol. VI, Admin. Dec. under Immigration and Nationality Laws, 481.

Under that line of administrative decisions, an alien serving in the armed forces of the United States who was tried by court-martial in this country would be deportable but an alien soldier tried by court-martial for the same offense while serving in the armed forces of the United States abroad would not be deportable (up to the passage of the present Immigration and Naturalization Act of 1952). The anomaly is intensified when it is considered that since the passage of the Act of 1952, if the reasoning pursued by the Board of Immigration Appeals in the case at bar be correct, the two alien soldiers who were held in the decisions last cited not to be subject to deportation under the previous statute, would have now become subject to deportation by reason of the enactment of the 1952 statute, which omits the words "in this country" (Section 1251(a)(4), supra), and which is retrospective (Section 1251(d)).

It is therefore settled that prior to the 1952 statute aliens convicted by court-martial while serving in the United States armed forces outside the United States were not subject to deportation on account of such convictions. If this situation has been changed by the 1952 Act, it can only be because of the omission of the words "in this country" from the statutory provisions relative to convicted aliens. We submit that no such significance can reasonably be attached to the mere omission of these words. It seems reasonable and probable that in the 1952 Act, the words "in this country" were omitted as superfluous since under the all-embracing definition of the term "entry" (8

U.S.C. Section 1101(a)(13)) contained in that statute, the words "after entry" in Section 1251(a)(4), supra, would necessarily imply that the convictions occur in the United States.

There is a further reason in support of the proposition that judgments of courts-martial are not to be considered as convictions for purposes of deportation. The discipline of the armed forces presents problems of great difficulty, and necessarily the military power and military tribunals are given great latitude in connection with the prosecution and punishment of offenders who are serving in the military forces. What might be punishable in those circumstances as a theft, for example, or as "stealing," might in fact, if it occurred in civil life, amount only to a mere civil tort, such as conversion of property without criminal intent. We think it is this which the Attorney General had in mind in stating in *Matter of P—,* supra, that although the alien had been charged with theft before an Italian court-martial and admitted that he did steal the money involved, there was no showing of "a criminal intent, or that respondent's conduct in the army would have constituted a civil crime under Italian law." In short, because of the very nature of the problem of military discipline, a soldier might be charged with and punished for the crime of theft in a court-martial proceeding where if the same act were committed in civil life it would not have amounted to a crime.

All these considerations are incompatible with the concept of a Congressional intent to include military

offenders convicted by court-martial within the purview of the deportation provisions under discussion. The question is not whether Congress could have included such cases within the purview of the statute but whether Congress did so. In determining that question, the narrowest meaning of the words used must be adopted. To interpret those words as including court-martial proceedings would place alien members of our armed forces in a much more disadvantageous position with respect to liability to deportation than that of alien civilians under similar circumstances. Only the clearest possible expression of the Congress should be construed as bringing about such a result.

Statutes making reference to convictions and offenses generally are not always interpreted as including proceedings before courts-martial. We would point out that the United States Supreme Court held in *Kurtz v. Moffitt,* 115 U.S. 487, 6 S.Ct. 148, 29 L.Ed. 458, that in the absence of express statute of Congress, neither the common law rule nor state statutes (California Penal Code, 836, 837, 849) relating to arrests of offenders without warrant were to be interpreted as applying to offenders against military law, punishable by court-martial. So also in *Getz v. Getz,* 332 Ill. App. 364, 75 N.E. (2d) 530, it was held that in view of the peculiarities of court-martial proceedings it could not be said that the Legislature, in enacting that conviction of a felony or other infamous crime constituted ground for divorce, had in contemplation anything except convictions which are the result of crimi-

nal proceedings under the usual procedures followed in the civil courts.

In its opinion in the case at bar, the District Court concluded that in the deportation statute Congress had not expressed any distinction between convictions in courts and convictions before military tribunals. But in the *Fong Haw Tan* case, supra, the Supreme Court considered a similar contention that the expression "sentenced more than once" made no distinction between two sentences in a single judgment and sentences in two separate criminal proceedings, and held that the language must be given its narrowest meaning, viz., that the alien after being once convicted and sentenced again commits an offense which gives rise to a second sentence. Furthermore, in the present statute the language of subsection 1251(b) does not lend itself to the construction that military tribunals were in contemplation. Consequently there is much more basis here for the narrower construction than there was in the *Fong Haw Tan* case, supra. Moreover, such considerations as the finality of judgments of courts-martial or their effect under so-called "double jeopardy" statutes are not germane to the question of statutory interpretation which is presented in the case at bar.

For all the foregoing reasons, we submit that the judgment of the court-martial in the case at bar does not constitute convictions of crime within the meaning of the deportation statute.

II.

APPELLANT HAS NOT BEEN CONVICTED OF TWO CRIMES INVOLVING MORAL TURPITUDE WITHIN THE MEANING OF THE DEPORTATION STATUTE.

One of the offenses which is the basis of the order of deportation was violation of Article 121 of the Uniform Code of Military Justice (50 U.S.C., former Section 715) in that appellant did "steal" a pistol which was the property of the United States. The pertinent portion of Article 121, supra, provides as follows:

> "Any person subject to this chapter who wrongfully takes, obtains or *withholds,* by any means whatever, from the possession of the true owner *or any other person* any money, personal property, or article of value of any kind—(1) with intent permanently to deprive or defraud *another person* of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner, steals such property and is guilty of larceny * * *." (Italics added.)

It will be observed that this Article, in its terms, is much broader than the usual definitions of larceny in ordinary criminal proceedings. It is not necessary that the offender withhold property from its true owner; it is enough if he withholds it from any other person with intent to deprive such other person of its use. It is quite conceivable that a soldier could be convicted under this particular Article for failing to turn in at the prescribed time an article of government property which had been issued to him for his

temporary use, or for taking for his own military use an article of equipment which had been issued to some other soldier. We might use one illustration which is common in military life, that should a soldier lose a piece of his own equipment and fear to face a reprimand for such loss, it is not uncommon to appropriate in its place a piece of equipment which had actually been issued to some other member of the company. In such a situation, there would obviously be no criminal intent or moral turpitude in the usual sense. Yet such an offender could undoubtedly be charged and punished under Article 121, supra.

It is settled that, unless the offense of which an alien is convicted is one which by its definition *necessarily* involves moral turpitude, the alien cannot be deported because in the particular instance his conduct might be regarded as immoral (*U. S. ex rel. Robinson v. Day* (C.A.2) 51 F.2d 1022. In the case at bar it would seem to be plain from the language of Article 121, supra, that appellant could have been convicted of violating that Article even on the basis of conduct which might have fallen far short of an act necessarily involving moral turpitude. In other words, the so-called "stealing" under that Article could have been simply a wrongful withholding which in civil life would amount to no more than a non-criminal conviction, or at least an infraction lacking in the elements of baseness and depravity necessarily involved in the concept of moral turpitude.

We submit, therefore, that under any view of the case, appellant has not been convicted of two crimes

involving moral turpitude within the meaning of the deportation statute.

CONCLUSION.

The seriousness of the consequences of deportation in this case are evident. The respondent came to the United States when he was a small boy and voluntarily joined the armed forces of the United States at the tender age of seventeen years. His parents are citizens of the United States. It is true that he has committed violations of the military laws, as set forth in the Uniform Code of Military Justice, and that he has undergone his punishment therefor and is still on parole. On the other hand, it does not necessarily follow that the conduct of which he was guilty, if committed in a civilian capacity, would be classified as the same sort of offense. It is in this background that we believe this case must be viewed. For the reasons hereinabove discussed, we submit that the deportation statute cannot reasonably be interpreted as comprehending within its terms convictions by a court-martial under the circumstances here presented. Prior judicial authority for such an interpretation is lacking, and we think the better administrative view in the past has been to the contrary, as hereinabove set forth. Finally, the Supreme Court of the United States has declared that the rule of construction must be the narrowest of several possible meanings of the words used. We believe, therefore, in the light of this rule of construction, and the other considerations

hereinabove set forth, that there is no escape from the conclusion that the court-martial convictions in this case are not within the purview of the provisions contained in 8 U.S.C., Section 1251 with reference to the deportation of persons convicted of crimes involving moral turpitude.

We respectfully submit that the judgment of the District Court should be reversed.

Dated, San Francisco, California,
January 15, 1958.

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(Appendix Follows.)

Appendix.

Appendix

EXHIBIT INTRODUCED INTO EVIDENCE.

Transcript Pages 17-18—Certified copy of Immigration and Naturalization proceedings received into evidence as defendant's Exhibit A for review by the court.